

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1203

To be argued by
GERALD L. SHARGEL

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN M. EBBECKE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF

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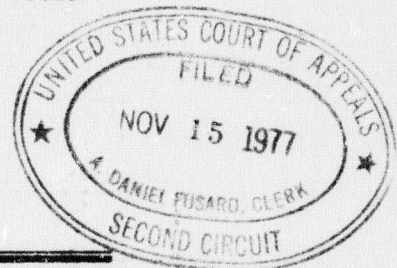


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BRIEF FOR APPELLANT
JOHN M. EBBECKE

Preliminary Statement

The appellant John Ebbecke appeals from a judgment of conviction in the United States District Court for the Southern District of New York, adjudging him guilty of three counts of aiding and abetting a violation of 18 U.S.C. §656 and one count of conspiracy to violate that section in violation of 18 U.S.C. §371. (Ward, J.) As a result of this conviction, appellant was sentenced on Counts One and Two to the custody of the Attorney General or his duly authorized representative for a period of one year and one day, the terms to run concurrently. On Counts Three and Four of the indictment, the sentence was suspended and appellant was placed on probation for two years. Appellant is presently at liberty on bail pending appeal.

STATEMENT OF THE FACTS

The appellant John Ebbecke was charged in a four-count indictment with aiding and abetting the embezzlement or misapplication of federally insured funds by a bank officer and conspiracy to commit that offense. The government's principal witness at trial was the rogue bank officer-turned-witness Frank Le Vien. From January, 1967 until his forced resignation in December, 1974, Le Vien was an Assistant Vice President and Commercial Lending Officer of the Manufacturers Hanover Trust Company. (A 9)* On July 15th, 1976, Le Vien pleaded guilty to two counts of violating §656 and on September 21st, 1976, received a prison term of one year and one day. (A 10) Le Vien confessed that he had engaged in an elaborate yet seemingly unsophisticated "kiting" scheme which involved the unauthorized transfer of money from bank customers' accounts to cover his own financial needs. As the scheme began to pyramid, money was temporarily abstracted from other customer accounts in order to cover existing shortages. Before detection, Le Vien resorted to authorizing loans in order to make a source of money available and, in some cases, even making fictitious loans, which were placed in the accounts of unsuspecting bona fide bank customers whose newly-found capital would be "borrowed" by Le Vien.

*The letter "T" refers to the trial transcript, while the letter "A" introduces reference to Appellant's Appendix.

In late 1973, Le Vien introduced an individual by the name of Dash Kalal to the appellant Ebbecke. (A 13) Ebbecke, a former bank official, was working as a financial consultant and was known to Le Vien both professionally and socially. (A 11 - 13) The purpose of this introduction was to see if Ebbecke could obtain additional financing for Kalal, who was attempting to construct a hotel in Nepal. (A 14 - 15) La Vien, on behalf of Manufacturers Hanover, had previously loaned money to Kalal but, as far as that bank was concerned, the limit had been reached. (A 14) In fact, Kalal suffered an overdraft of \$70,000. (A 13)

Due to a snag in the financing which Ebbecke hoped to obtain for Kalal, Le Vien himself attempted to help Kalal clear up the \$70,000 overdraft. (A 18) To further his efforts, Le Vien introduced Kalal to two of Le Vien's "personal friends" who supplied the needed money. (A 18 - 19) One of these friends was Judd Feinerman, an ordained rabbi, who supplied \$50,000. (A 19 - 20) Exceeding even Madison Avenue's image of friendly banker, Le Vien, who in 1974 earned \$25,000 per year and who had liquid assets in the amount of three or four thousand dollars, guaranteed Kalal's obligation to repay Feinerman. (A 20 - 21)*

As fate would have it, Kalal died in a plane crash one month after Le Vien guaranteed the \$70,000 loans (A 22) Faced with the insolvable problem of repaying Kalal's obligation,

*Le Vien also arranged for Henry Levy, a restaurateur, to lend Kalal \$20,000 in order to satisfy the \$70,000 overdraft. This loan was guaranteed by a verbal agreement that Le Vien would repay Levy if Kalal did not. (A 21 - 22)

Le Vien took an approach which was both brazen and criminal rather than confess error.

"I decided the only way I could do this was take funds from one account in the bank and pay it off and try to manipulate the best way I could so that I could honor this obligation that I had made in the form of a guarantee."
(A 24)*

As a result of this "decision," Le Vien took \$70,000 from an existing account, Chempar Chemical Co., Inc., (Chempar) and repaid Feinerman and Levy. (A 24 - 25)

Although Feinerman and Levy were now satisfied, Le Vien was still faced with a \$70,000 shortage in Chempar's account. According to his testimony, Le Vien turned to John Ebbecke for help. (A 27) Le Vien testified that Ebbecke offered to introduce corporate borrowers to the bank who "would be in a position to try to help me in my problem." (A 27) The first such borrower was Frank Lettieri, president of Cellini Furniture Corporation of Brooklyn, New York (Cellini). Multiple loans were then made to Cellini and another one of Lettieri's businesses, F.N.L. Corp., in the aggregate amount of \$167,000. (A 28 - 29)** Following these loans, Le Vien took \$52,000

*This quote from Le Vien's testimony may, at first blush, seem taken out of context. Immediately prior, Le Vien testified, "I had discussed this with John Ebbecke, and it was decided -" It is clear that Le Vien's unsolicited alteration of ". . . it was decided" to "I decided" was intentional and it was Le Vien who chose this course of conduct. (A 24)

**A \$60,000 loan was F.N.L. Corp. (A 28) Cellini Furniture received \$30,000 on July 8th, 1974, \$25,000 on July 26th, 1974 and \$52,000 on August 19th, 1974. (A 29)

from Cellini and repaid Chempar. (A 30) John Ebbecke, according to Le Vien, was "advised" about the Cellini-Chempar conversion.

Apparently enthused by the simplicity and ease of this scheme, Le Vien parlayed his act of desperation following Kalal's death and in the same month, July, 1974, he embezzled an additional \$12,500 from the Cellini account to purchase a new Long Island home for himself. (A 31) The purchase of the new home complicated the problem even more. Now realizing that "the best" was only as far away as his customer's accounts, Le Vien selected a house with a purchase price of \$125,000. (A 31 - 32) To accomplish this, Le Vien had to "channel" funds from "two or three related accounts at the bank" into Cellini's account and Cellini's money was used to purchase the house. (A 32) Once again, Ebbecke was "advised" that Le Vien was using wrongfully obtained funds, in this case, for the purchase of the house. (A 32)*

Le Vien then testified that also in July, 1974, which was apparently a busy month, Ebbecke told him that he was indebted to Judd Feinerman for \$10,000 and that he, Ebbecke, was being pressed for repayment. (A 32 - 33)

"I told John [Ebbecke] in a telephone conversation that Judd Finerman was asking for the money and he was calling me for the money and John said that he would see what he could do and he would call me back, which he did." (A 34)

*Ebbecke's alleged response, after being so "advised": "He didn't say anything. Basically, I just told him what I was doing and he offered to help." Later, the witness testified that Ebbecke would "offer to help by talking to Frank Lettieri, the president of the company." (A 32)

Then, according to Le Vien, Ebbecke called him back and instructed him to take \$10,000 from the Cellini account and "that he had spoke [sic] to Frank Lettieri." (A 34) Ever accommodating, Le Vien took the \$10,000 account and issued a check in that amount to Judd Feinerman. (A 24) Le Vien concluded this aspect of his testimony by stating that to his knowledge, Ebbecke never returned the \$10,000 to the Cellini account. (A 35)

In August of 1974, pressure began to build when the Cellini account, through no fault of the corporation, became overdrawn. (A 36) When Cellini's president, Frank Lettieri, made an inquiry, Le Vien plaintively asked, "Was it mentioned to you by [Ebbecke] that I had a problem?" Lettieri said, "Yes." (A 36)

The scheme then became more complicated. In "July or August of 1974," Ebbecke introduced Andrew Nesbit, President of Andy's Marine Incorporated, (Andy's Marine) to Le Vien and his bank. Nesbit was a client of Ebbecke's and in need of financing. (A 37) Le Vien testified that Ebbecke told him that if he could make a loan to Andy's Marine, he could take "whatever he needed" to cover up the other short accounts. (A 38) Without any persuasion, Le Vien arranged a \$25,000 loan to Andy's Marine after financial statements were furnished. (A 38 - 39) Le Vien, according to his testimony, was concerned that Nesbit seemed unaware of his "problems," so he called Ebbecke. (A 39)

"So [Ebbecke] told me that he would speak to him, not to worry about it, and to take what I needed." (A 39)

Le Vien, by then the consummate account-converter, took \$20,000 of the

\$25,000 that was loaned to Andy's Marine and put the money into the previously ravaged Cellini account. (A 39)

In late August, Ebbecke introduced Frank Leone, the President of Ficarra Furniture Company (Ficarra) to Le Vien. (A 39)* After evaluating Ficarra's financial statements with another officer of the bank, a \$90,000 loan was made. (A 40) As Le Vien testified, "...things were getting rather hectic at that point." (A 41) Several accounts were short and additional monies were needed. (A 41) Once again, Le Vien, according to his testimony, looked to Ebbecke for help. Ebbecke stated that he would "talk to Frank Leone" and there would "no problem" as long as Le Vien replaced whatever he took. (A 41) Seizing the opportunity, Le Vien took \$60,000 of the \$90,000 loaned to Ficarra which he put into other short accounts. (A 42)**

As the kiting scheme continued, new accounts meant new vistas. One such new account was Alpha Scaffolding, which was owned by Jack Kitson. (A 43) Although Le Vien testified that Ebbecke "represented" Kitson in connection with opening the account, it was Le Vien who first introduced Kitson to Ebbecke. (A 43) Alpha was given a loan of \$70,000 but Le Vien immediately took \$65,000 to cover checks that were drawn by the Cellini Corp. (A 43) Once again, Ebbecke was "advised" that this had been

*Le Vien then testified that he had known Frank Leone for several years. (A 39 - 40)

**This money went into, among others, the Cellini and Andy's Marine accounts. (A 42)

done. No such advised was given to Kitson. (A 43 - 44)

When not surprisingly Alpha's account became overdrawn, since Kitson believed that he had \$70,000 in it, money was taken by Le Vien from Ficarra to cover Alpha. (A 44) Ficarra's principal, Frank Leone, made prompt complaint and so Le Vien had to "move funds" out of another account into Ficarra's account. (A 44 - 45)

Since, according to the old adage, "you can't fool all the people all the time," a meeting was held with a group of the "victims" of Le Vien's scheme. (A 45) The meeting was held at the offices of Ficarra Furniture with Kitson, Leone, Lettieri and Ebbecke present. (A 45) The discussion quickly turned to the question of how much money was needed to "straighten out the various accounts." (A 47) Ebbecke was asked by Le Vien whether he could help, but the reply was not promising.

"I asked [Ebbecke] if he could help and he said at that time there wasn't much he could do." (A 47)

Describing himself as "on the desperate side," Le Vien then said that he would have to "do something at the bank to get the funds," but needed a corporate vehicle to repay the shorted accounts. (A 47) Apparently deciding to start over, Le Vien again focused on the Chempar account. (A 48) In order to accomplish his objective, Le Vien sua sponte arranged a fraudulent loan for Chempar and then withdrew the borrowed funds - \$75,000 - all without Chempar's knowledge. (A 48) A Manufacturers Hanover Trust check for \$75,000 was then delivered to Grammercy Capital, a corporation owned by Ebbecke. (A 49) In turn, a Grammercy Capital check was made payable to Ficarra in the amount of

\$68,000. (A 51)

Following this transaction, caution was thrown to the wind. Without their knowledge, Chempar "borrowed" \$150,000 on October 15th, 1974. This money was used to repay Cellini Furniture and Andy's Marine. (A 55 - 56) Also out of this \$150,000, Le Vien put \$1,500 into the Grammercy account because Ebbecke told him that he "needed some funds" for personal expenses. (A 56 - 57) Although there was no evidence of this obligation, Ebbecke was never told where Le Vien got this \$1,500. (A 58) This money was never repaid. (A 59)

The next transaction testified to by Le Vien dealt with a man by the name of Karl Koch. Koch had recently sold a business and was investing \$255,000 in a Certificate of Deposit. (A 60) Ebbecke introduced Koch to Le Vien. (A 60) The introduction was made at a meeting in Gatsby's Restaurant in Manhattan. (A 60) One day later, Koch came to the bank and purchased what he believed to be a Certificate of Deposit in the amount of \$255,000.

(A 61) Although Koch gave Le Vien a certified check in the amount of \$255,000, no such certificate was purchased. (A 61) The following day, Le Vien "asked" Ebbecke whether he could use these funds to "help. . .with my situation." Once again, according to Le Vien, Ebbecke said that he could use the funds. (A 62) Le Vien then asked Ebbecke which account should be covered by the new-found money. Ebbecke replied that "he really didn't know" and said "use whatever one [you] think is best." (A 63) The \$255,000 was then put into the Alpha Scaffolding account. (A 64) Kitson, Alpha's principal, came into the bank some time

thereafter. Kitson then told Le Vien that Ebbecke had told him that a large amount of money had gone into his account and so he would like to take some money out. (A 65) Kitson also stated that he wanted to cash a \$2,000 check because Ebbecke needed money. (A 65) this \$2,000 was given to Ebbecke by Kitson in Le Vien's presence. (A 66) Le Vien also identified a \$15,000 check that went from Alpha into Grammercy Capital. (A 69) Le Vien then testified that he used portions of Alpha's newly-found money to repay other accounts and also to obtain cash for his own use.

Finally, in November of 1975, Ebbecke, according to Le Vien, needed \$10,000 to pay a legal fee. Ebbecke approached Gerson Fabe, an insurance agent, who agreed to take a loan from Manufacturers Hanover and give the proceeds to Ebbecke. (A 70 - 71) Because Ebbecke's credit rating was insufficient, the loan was made to Fabe and Ebbecke was the co-maker. Before taking the loan, however, Fabe asked that Le Vien agree that in the event Ebbecke defaulted, Le Vien would be liable for \$4,000 or 40% of the loan. (A 71) Ebbecke, over a period of time, reduced this loan to \$3,150, but defaulted on the balance. (A 73) Le Vien decided that Fabe had been unduly put upon so instead of abiding by his agreement to pay 40% of any default which occurred, he took the money from Alpha Scaffolding and paid the entire \$3,150. (A 73)

After Le Vien had testified, a number of witnesses were called whose names had become familiar through Le Vien's testimony. First among the was Frank Leone, the principal of Ficarra Furniture. (A 92) Leone testified that he had used Ebbecke in an attempt to obtain financing for his company.

(A 93) Eventually, Leone was introduced by Ebbecke to Le Vien. (A 95) Leone met with both Le Vien and the manager of the branch, who agreed to lend him \$90,000. (A 95 - 96) When Ficarra's checks began to bounce, Leone complained first to Le Vien, who told him that there was a mistake and it would be corrected. (A 97) Although Leone's testimony was imprecise, he believed that on one occasion he asked Ebbecke, "what's going on?" and Ebbecke said he would check it with Le Vien. (A 97 - 98) There was, however, no subsequent conversation with Ebbecke prior to the meeting at Ficarra Furniture. (A 98) Because he was busy with his business customers, Leone could not testify to the conversations at the meeting which was held at Ficarra Furniture. (A 98) Leone's only expressed interest was getting the money that was due to him. (A 98 - 99) Le Vien later told Leone about the \$68,000 check drawn from Grammercy Capital into his account and Leone was also told the money had originally been put in the wrong account. (A 100)

The government's next witness was Karl Koch, who testified to the purchase of what he thought to be a \$255,000 Certificate of Deposit. (A 120 -136) Cross-examination of Koch revealed that Ebbecke had no prior knowledge of Koch's intention to purchase the Certificate of Deposit.

"Q At any time prior to the time you gave the check to Mr. Le Vien, did you tell Mr. Ebbecke you were going to buy this C D from the bank?

A. No.

Q Did you ever discuss with Mr. Ebbecke the prospect of purchasing a C D from the

Manufacturers Hanover Bank?

A It was Ebbecke's - if that is a yes or no, specifically, no.

Q So then at the time you made this deposit, gave this check to Mr. Le Vien, Mr. Ebbecke had no knowledge of the existence of this check or this deposit, is that correct?

A That's correct." (A 138)

Gerson Fabe, the insurance agent who obtained a \$10,000 loan from Manufacturers Hanover for Ebbecke's benefit, testified that he had indeed received \$3,150 from Le Vien when Ebbecke defaulted on the payment. (A 156 - 160)

Frank Lettieri, the principal of Cellini Furniture, was introduced to Ebbecke by Frank Leone. In an attempt to gain financing, Ebbecke introduced Lettieri, through Judd Feinerman, to Le Vien. (A 165) Le Vien then arranged a series of loans to Cellini. (A 166 - 168) Despite this new funding, Cellini's checks were bouncing and Lettieri attempted to find out why. (A 168) Le Vien told Lettieri that he had taken \$10,000 out of his account for Mr. Ebbecke. When Lettieri confronted Ebbecke, appellant admitted that he had received the \$10,000 and, although Lettieri was displeased, he said it was "all right." (A 169)*

Lettieri was also present at the September meeting at Ficcaro Furniture Company. (A 170) At this meeting, according to Lettieri, the "kiting" which Le Vien had previously done was exposed. (A 172 - 173) It seems that no one was particularly

*This \$10,000 received by Ebbecke was not charged as a substantive account in the indictment.

disturbed about Le Vien's criminal acts as long as each of the participants was not adversely affected. (A 123)

Frank Leone, who apparently registered the most vociferous complaint, was assured that his checks would not bounce. According to Lettieri, Ebbecke concluded the meeting by telling Le Vien to take \$25,000 out of Jack Kitson's account (Alpha Scaffolding) and cover Frank Leone's account. (A 173) It is interesting to note that Jack Kitson, himself, was present at this meeting. (A 172)*

Jack Kitson, on the other hand, testified that although he was present at the Ficarra meeting, he didn't have any recollection of anyone saying that they were going to take \$25,000 out of his account. (A 186) Kitson testified that during a search for financing, he was introduced to Frank Le Vien, who agreed to provide the necessary financing if Kitson would agree to retain, as a financial consultant, John Ebbecke.

* On cross-examination:

"Q Mr. Lettieri, you testified that at that meeting held at Ficarra Furniture, Mr. Ebbecke told Mr. Le Vien to take \$25,000 from Mr. Kitson's account to cover Mr. Leone's checks? Was that your testimony?

A Yes.

Q Mr. Kitson was there at that meeting, wasn't he?

A Yes?

Q What, if anything, did he say about that?

A Mr. Kitson didn't say anything?

Q He said nothing. He did hear that instruction?

A Yes." (A 175)

(A 182) Agreeing to this, a loan was obtained in the amount of \$70,000. (A 183) Since Le Vien had immediately purloined \$65,000 of this \$70,000, when Kitson began to issue checks on the account, they bounced. (A 183) Le Vien blamed the shortage on the infirmities of computer technology and Kitson, "being an anti-computer man," accepted the explanation. (A 184) Kitson also testified that he did not authorize a check to be made to John Ebbecke in the amount of \$15,000 on December 6th, 1974, although it was his signature which appeared on the check. (A 188) Kitson explained that Le Vien told him that certain monies had "accidentally or otherwise" gotten into the wrong accounts and the only way to get them out was if Kitson would sign blank checks, which he did. (A 192 - 193) Significantly, John Ebbecke was not present when this was done. (A 193)

The government's last witness on its direct case was Judd Feinerman, who corroborated Le Vien's account of the Dash Kalal transaction and the \$10,000 loan which had been made to Ebbecke. (A 200 - 202)

John Ebbecke, testifying on his own behalf, described his career as a loan officer for various banks until he started his own financial consulting firm. (A 222 - 226) In late 1972, Ebbecke invested in a boat sales operation which almost immediately began to fail. (A 228 - 229) Trying to find long-term financing for himself, Ebbecke was introduced to the Manufacturers Hanover Trust Company by Gerson Fabe, his insurance broker. (A 229) Ebbecke met two officers of the 42nd Street branch of Manufacturers Hanover Bank, one of whom was Frank

Le Vien. (A 230) At this time, Ebbecke was in deep financial trouble and unable to borrow on the basis of his own credit rating. It was suggested by Le Vien that Ebbecke use a nominee to obtain the money he needed. (A 232 - 233) Gerson Fabe became that nominee and a \$10,000 loan was obtained. (A 234) The agreement that Le Vien was to guarantee a portion of this debt was accomplished with the aid of an attorney. (A 233 - 235) After this transaction, Ebbecke established a business relationship with Le Vien and attempt to develop new business for the bank. (A 238 - 239) One of the first new pieces of business brought to Le Vien was the Dash Kalal transaction. (A 239) Among others, Ebbecke brought in Andy's Marine, which received a loan of \$25,000. Ebbecke believed that the \$25,000 loan went into the Andy's Marine account. (A 248) Ebbecke denied telling Le Vien at any time that he personally could draw against those proceeds. (A 249)

With respect to the loan to Frank Leone and Ficarra Furniture, Ebbecke testified that it was Le Vien who asked if Grammercy Capital, Ebbecke's company, could advance the monies which he, Le Vien, had illegally withheld from Ficarra. Ebbecke said that he didn't have that much cash on hand, but was told by Le Vien that an advance would be made to him in order to channel the money to Ficarra's account. According to Ebbecke, the discrepancy between the \$75,000 that was put into Grammercy Capital and the \$68,000, which was turned over to Ficarra, was a \$7,000 fee that was due Ebbecke. (A 255) Ebbecke did not know that this money was drawn against the Chempar Chemical account. (A 256)

As to the Koch Certificate of Deposit transaction, Ebbecke testified that he had no knowledge that Koch was going to purchase a Certificate of Deposit prior to his doing so. (A 259 - 260) Ebbecke denied ever receiving a \$2,000 check drawn on Alpha Scaffolding following the misapplication of Koch's \$255,000. (A 260 - 261) Ebbecke testified that he never told Le Vien that he could draw against the Alpha Scaffolding account, nor did he ever discuss this matter with Le Vien. (A 265)

The \$1,500 loan, which formed the basis of Count Two of the indictment, was explained by Ebbecke as follows: At a time when Ebbecke was short of funds, he called upon Le Vien to lend him \$1,500. Le Vien agreed and furnished a check for \$1,500. At no time did Ebbecke know the source of these funds. (A 265) * Ebbecke concluded his direct testimony by stating that Le Vien never told him that he was personally using monies on deposit at the Manufacturers Hanover Trust Company. (A 266) Nor did he have any agreement with Le Vien by which he would bring accounts into the bank so that Le Vien could misapply the monies on deposit. (A 266)

* Le Vien, in fact, testified that Ebbecke did not know the source of these funds. (A 266)

QUESTIONS PRESENTED

1. Whether the evidence taken in the light most favorable to the government supports Ebbecke's conviction for conspiracy and aiding and abetting Frank Le Vien's violation of 18 U.S.C. §656.

2. Whether under the peculiar circumstances of this case, it was error to admit evidence of other crimes pursuant to Rule 404(b), Fed.R.Evid.

STATUTES INVOLVED

Title 18, United States Code, Section 2, states as follows:

"§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Title 18, United States Code, Section 656, states as follows:

"§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve System or which is insured by the Federal Deposit Insurance Corporation, or from any safe deposit box in or adjacent to the premises of such bank, shall be fined not more than \$5,000 or imprisoned not more than five years, or both;

but if the amount taken or concealed does not exceed \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both; and shall be disqualified from holding office as a national bank examiner or Federal Deposit Insurance Corporation examiner.

This section shall apply to all public examiners and assistant examiners who examine member banks of the Federal Reserve System or banks the deposits of which are insured by the Federal Deposit Insurance Corporation, whether appointed by the Comptroller of the Currency, by the Board of Governors of the Federal Reserve System, by a Federal Reserve Agent, by a Federal Reserve Bank, or by the Federal Deposit Insurance Corporation, or appointed or elected under the laws of any State; but shall not apply to private examiners or assistant examiners employed only by a clearing-house association or by the directors of a bank."

POINT I

THE EVIDENCE CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT IS INSUFFICIENT TO SUPPORT A FINDING THAT JOHN EBBECKE WAS AN AIDER AND ABETTOR IN FRANK LE VIEN'S EMBEZZLEMENT SCHEME.

Appellant John Ebbecke's broadest attack on appeal is that the evidence, considered in the light most favorable to the government, is insufficient to support a conviction of conspiracy and aiding and abetting. United States v. Taylor, 464 F.2d 240 (2nd Cir. 1972). At first blush and from a distant view, it would seem that both the grand jury and the government correctly perceived Ebbecke as an integral part of Le Vien's fraudulent scheme. A closer examination of the evidence, however, reveals that Ebbecke's participation never elevated him to the status of a conspirator or aider and abettor. Simply stated, the "kiting" scheme was Le Vien's "thing" and Ebbecke never encouraged or

participated in it with a desire to forward it. United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938); United States v. Docherty, 468 F.2d 989, 992 (2nd Cir. 1972); United States v. Giordano, 489 F.2d 327, 330 (2nd Cir. 1973).

The three substantive counts in the indictment each pertain to particular monies which Le Vien wrongfully obtained from customer accounts. In each instance, a portion, and in one case all of the money which had been wrongfully taken wound up in the hands of appellant Ebbecke. Naked possession or receipt of these monies, however, is not criminal. In order to sustain a conviction under 18 U.S.C. §2, the government must have proven not only that Le Vien, as a bank officer, violated §656, but that Ebbecke had knowledge of the criminal activity of the bank officer and, as stated before, encouraged or participated in it with a desire to forward it. See, United States v. Turnipseed, 272 F.2d 106, 107 (7th Cir. 1959).*

The first substantive count, Count Two, charges aiding and abetting the embezzlement of \$75,000 on September 13th, 1974. This \$75,000 represented the money which was first put into the Chempar Chemical account via a fraudulent loan and then taken out of Chempar to satisfy the Ficarra account. (A 48 - 51) This was accomplished by taking a Manufacturers Hanover check, Government Exhibit 42, and issuing it to Grammercy Capital

* It is clear that Ebbecke, since he was not an officer of the bank, could not be guilty of violating 18 U.S.C §656 as a principal. See, United States v. Weitzel, 246 U.S. 533 (1918); United States v. Tornabene, 222 F.2d 875, 877 (3rd Cir. 1955).

Ebbecke's corporation, which in turn paid Ficarra \$68,000, deducting a \$7,000 fee. (A 51) The government will undoubtedly argue that at the time the circuitous transfer was made, Ebbecke was fully aware of Le Vien's shenanigans at the bank. Notwithstanding this knowledge, however, there was no evidence presented at trial that Ebbecke knew that the \$75,000 was to be illegally obtained. This \$75,000 transfer from the bank, it must be remembered, came almost immediately after the "creditors meeting" at Ficarra Furniture. The stated purpose of this meeting was to clear the air with the disgruntled depositors and provide an opportunity for Le Vien to repair the damage that had been done.

It was at this meeting that Le Vien asked Ebbecke if he could help and "[Ebbecke] said at that time there wasn't much he could do." (A 47) Then, Le Vien testified, "I said to [Ebbecke] that I would have to do something at the bank to get the funds and I didn't mention where I was getting the funds from." (A 47) Whether we accept this testimony or Ebbecke's testimony that Le Vien told him that the monies would be "advanced" to the Grammercy account (A 56), there is no evidence on which to find, beyond a reasonable doubt, that Ebbecke had knowledge that these monies were to be embezzled. Furthermore, despite the fact that Ebbecke thereafter took \$7,000, apparently without anyone's permission, there was nothing to show that Ebbecke either participated in or had a stake in Le Vien's venture which specifically was embezzling money from the bank. Even if it be assumed that Ebbecke was guilty at that point of larceny under New York State law, the government was required to prove that he was an active participant in a very particular type of conduct, i.e., aiding and abetting a bank officer in his effort to embezzle money from a bank. United States v. Peoni, supra. No such proof was forthcoming.

Proof of guilty knowledge, active participation and aiding and abetting on Count Three of the indictment, which related to the \$1,500 that Le Vien loaned to Ebbecke, is totally nonexistent. Le Vien testified that on October 31st, 1974, Ebbecke told him that he needed some funds. Le Vien testified:

"So I agreed to, for personal expenses, and I agreed to give him the funds in the form of an official check payable to the company for \$1,500."
(A 57)

Ebbecke testified that he did indeed receive \$1,500 from Le Vien and it was as a result of asking for a loan. (A 265) Ebbecke testified that he did not know the source of these monies:

"Q Did you know at that time the source of of these funds?

A No, sir, I did not."

Le Vien himself testified:

"Q Did you tell Mr. Ebbecke where you were getting this check for \$1,500 from?

A No." (A 57)

Le Vien testified that the \$1,500 that he gave to Ebbecke was part of the \$150,000 which was fraudulently loaned to and then taken from Chempar Chemical. (A 56) There was again, however, no proof that Ebbecke knew of this, participated in it or in any way aided and abetted Le Vien in accomplishing this end.

On the last count of the indictment, which pertained to the \$255,000 which was literally stolen from Karl Koch, there is simply no proof that Ebbecke was an aider and abettor in the very specific and narrow crime of purloining this money. It was only after the money had been taken that Le Vien had a conversation about it with Ebbecke.

"We still had the problem of getting this account cleared up and that account cleared up. So I said - I had a conversation with John on the telephone and I asked John whether these funds can be used to help me with my situation, because I didn't know what the relationship he had with Karl Koch, because I didn't have any at all." (A 62)

* * * *

"Q Did John Ebbecke suggest any account into which the money should go.?

A Actually I believe it was myself, I had a conversation with John, and I asked John what account did he think I should use, and he said he really didn't know. Use whatever one I think is best. And I suggested Alpha Scaffolding, Jack Kitson was the president of the company, and John said, 'okay.' "
(A 63)

Consider the following analogy: If "A" committed a bank robbery and then asked his friend "B" how to distribute the proceeds, it may well be that "B" is liable as an accessory after the fact, but he would certainly not be liable as an aider and abettor in the bank robbery itself. That is the thrust of Ebbecke's claim on appeal with respect to each of the three substantive counts. The evidence may well support that Ebbecke played a "role" in Le Vien's activities. The evidence, considered in the light most favorable to the government, may also support a finding that some of Ebbecke's activities were criminal. But there is no evidence to support any of the charges contained in this indictment; namely, that Ebbecke aided and abetted, that is, actively participated in Le Vien's actual embezzlement from the bank.

The conspiracy charge is equally fallacious. Le Vien, according to his own testimony, began to manipulate his customer's accounts on his own.

"I had discussed this with John Ebbecke, and it was decided - I decided the only way I could do this was to take funds from one account in the bank and pay it off and try to manipulate the best way I could so that I could honor this obligation that I had made in the form of a guarantee." (A 24; emphasis supplied)

The record in this case does not support a finding that Ebbecke and Le Vien were partners in crime; that they had entered into any agreement to embezzle customers' monies; and from the evidence presented, one cannot infer such an agreement. The mere fact that Ebbecke is alleged to have "sat back" while Le Vien attacked these various accounts, including accounts which incidentally were not brought in by Ebbecke such as Chempar Chemical, does not suggest that Ebbecke was involved in a criminal agreement. Even if Ebbecke gave his tacit approval to Le Vien's conduct, this may have been immoral, but it was not criminal. The crime here, violation of 18 U.S.C. §656, was committed by Le Vien and Le Vien alone. Ebbecke's conduct, considered in any light, simply does not fall within the purview of this section or §2.

POINT II

THE ADMISSION OF "OTHER CRIMES" TESTIMONY UNDER THE PECULIAR FACTS AND CIRCUMSTANCES OF THIS CASE WAS REVERSIBLE ERROR.

This was a strange case indeed. Frank Le Vien, caught with his hand in the proverbial "cookie jar," pleaded mea culpa and then sought to soften the consequences of his acts by claiming that appellant Ebbecke, in effect, "told him to do it." Whether Ebbecke's conduct rose to the level of aiding and abetting under 18 U.S.C. §2 is the issue presented in Point I of this brief. Under any analysis, this case was a close one. It pitted Le Vien's testimony squarely

against Ebbecke's. The corroborating documents and testimony no doubt involved Ebbecke in the loan transactions which were testified to at trial. But the critical question was whether Ebbecke's involvement in these transactions was criminal.

In support of the allegation that Ebbecke's involvement was in fact criminal, the government enjoyed free rein to prove every aspect and detail of Ebbecke's relationship with Le Vien. This proof was much broader than the specific charges contained in the indictment. The indictment's substantive counts, Counts Two, Three and Four, charged that Ebbecke aided and abetted the embezzlement of \$75,000 (the Ficarra transaction), \$1,500 (the personal loan transaction) and \$255,000 (the Koch transaction). The conspiracy count essentially focused on the same transactions. Beyond this, however, the government introduced proof to show that Ebbecke had knowledge of the \$70,000 taken out of the Chempar Chemical Company in order to repair the Dash Kalal mishap (A 24); testimony was also introduced to show that Ebbecke had knowledge that Le Vien was embezzling money from Cellini Furniture for his own personal use (A 32); and, perhaps most importantly, that Ebbecke had received the benefit of \$10,000 taken from the Cellini account to pay Ebbecke's obligation to Judd Feinerman. (A 34) All this testimony preceded the proof on any of the overt acts charged in the indictment and, of course, on any of the substantive counts. From the government's viewpoint, therefore, the petit jury was given a clear and thorough understanding of each occasion of Le Vien's mismanagement and embezzlement of customers' accounts and any knowledge or alleged participation on Ebbecke's part.

After conclusion of Le Vien's testimony,* the government attorney announced his desire to introduce proof of other crime or similar acts by Ebbecke. Rule 404(b), Fed.R.Evid. The government's proffer was that in March of 1974 Ebbecke had participated in the forgery of a letter of credit on the stationery of the Hempstead Bank. The proof would further show that by use of an outstanding personal loan which Ebbecke had made to Lester Wadsworth, an officer of that bank, Ebbecke persuaded the bank officer to confirm the authenticity of the forged letter of credit. (A 109 - 110) The district court's literally immediate reaction to this proffer was that the Wadsworth transaction was in no way similar to the acts charged in the indictment. (A 110) Extended colloquy was then interspersed throughout the record. (A 210 - 220)** The court first considered the possibility of allowing this evidence in on rebuttal in the event defendant testified. In the court's initial view, admission of this testimony would be relevant to appellant's credibility.

"If he does [testify] and denies any participation in these acts, you could inquire about his participation in similar acts and I think this would not be extrinsic evidence which would not be barred at that time." (A 110)

* * * *

"I have difficulty 'similar' acts." (A 111)

The court, then, ruled against the government and concluded that:

"I frankly have difficulty in seeing these as similar acts.

*Le Vien was the first witness to testify on behalf of the government.

** (A 107 - 117)

Similar acts would include Alpha, it would include Ficarra, it would include the other transactions which were shuffled in and out of the Manufacturers.

If a similar shuffling in and out of accounts was carried out at another bank at approximately the same time, before or after, I would allow that testimony.

I have difficulty at this juncture in seeing the acts as similar and believe, also, that at this juncture admitting this evidence would produce confusion in the minds of the jurors which, at least in my judgment, would be prejudicial to the defendant.

The application to prove this, present this similar act evidence is denied." (A 117; emphasis supplied)*

A short time later in the trial, the issue of the admissibility of this evidence was again considered by the court. At this time the court recognized the competing considerations in admitting testimony of this nature and noted that prejudice and confusion were critical factors. (T 288) Indeed, the court stated that it was not certain that a limiting instruction would suffice to avoid confusion. (T 288) Once again, the court expressed doubt as to the relevance or similarity of the proffered testimony. (A 213) And once again, the court concluded by ruling against the government although announcing that the issues would be considered "during the luncheon recess." (A 214)

After the luncheon recess, the court considered the "whole matter on balance," and reaffirmed the ruling against the government. (A 220) The court cautioned, however, that if the

*The court made it clear at this time, however, that in the event the appellant testified, the testimony would be admissible in rebuttal. (A 116 - 117)

appellant testified and placed his character in issue, the court would be receptive to an application to present the evidence on the government's rebuttal case. (A 220)

As predicted, the appellant then testified on his own behalf. On his direct testimony, as noted in the Statement of the Facts, the appellant explained each of the Le Vien transactions and denied guilt. In no conceivable way did he "open the door" to the Wadsworth transaction. The government, however, had established an ambush.*

On cross-examination of Ebbecke, the government attorney spent more than one-third of his questions on the Wadsworth transaction.** This cross-examination was objected to by trial counsel. (A 292-93, 295) In response to this objection, the jury learned that this cross-examination on the Wadsworth transaction was relevant to Ebbecke's credibility:

"MR. WEINBERG: If your Honor please, at this time I would like to raise an objection to this entire line of questioning as improper cross-examination.

MR. REILLY: Your Honor, this goes to his credibility.

*It may be said that the appellant walked into this ambush with his eyes open. The court, on more than one occasion, clearly warned that the government would probably be able to use this testimony on cross-examination and in rebuttal. The appellant then faced a Hobson's choice; he could either testify and face the impact of the court's ruling or not testify at all. Since Ebbecke, himself, was the only witness who could rebut Le Vien's testimony, he had only one clear path to follow.

**Cross-examination of Ebbecke begins in the trial transcript at p.343 and ends at p.383. Cross-examination on the Wadsworth transaction begins at p.367 and ends on p.381.

THE COURT: If it is directed to credibility, I do afford counsel latitude on cross-examination.

MR. WEINBERG: If we have a representation from Mr. Reilly that it is directed solely toward credibility.

MR. REILLY: Your Honor, that is where I am proceeding.

THE COURT: All right. He has so represented.

MR. WEINBERG: Thank you." (A 296; emphasis supplied)

As a result of what best can be described as inartful cross-examination on the subject, the examiner received a series of fuzzy answers at the conclusion of which nothing seemed very clear to anyone, much less the jury. (A 292 - 306)*

This, then, was the state of the record at the conclusion of the cross-examination of defendant Ebbecke. The jury, for the first time, heard a series of questions and answers, significant in number, which bore on issues of which they were previously unaware. The Ebbecke-Le Vien transactions, which had consummated the entire trial up to that point, were complicated enough. Now, entirely new and even more confusing horizons were opened for the jury. Moreover, the jury was told, with the court's tacit approval, that these questions and answers were relevant to the appellant's credibility. (A 296)

When the defense rested, the plot thickened. As expected,

*It seemed at this point that the attorney was attempting to wrestle the witness into denying that which he was prepared to prove.

the court ruled that the government could present a rebuttal case. When the government announced that it wished to call Mr. Wadsworth as its first rebuttal witness, the court instructed the jury as follows:

"THE COURT: Ladies and gentlemen, Mr. Wadsworth's testimony is not being offered to prove the character of the defendant. Instead, as I understand it, it is being offered solely on the issues of knowledge and intent and should be considered by you only in connection with those issues.

Are there any further limiting instructions which either counsel wishes the court to put to the jury?"
(A 309)

Following this instruction, counsel met with the court at the sidebar. (A 309) At this sidebar conference, the government requested the court to instruct the jury that, Wadsworth's testimony would be offered on the issue of credibility as well as knowledge and intent. (A 310) The court then reminded government counsel about Rule 608(b) which expressly prohibits this extrinsic evidence of specific instances of the conduct of a witness. (A 310 - 312)* With his recollection of the rule refreshed, the government attorney quickly shifted gears and relied on the substance of Rule 404(b) to admit the testimony. (A 312)

The following day, the government called two witnesses; David Kaplan and Lester Wadsworth, himself, to testify to the so-called Wadsworth transaction.** When both Kaplan and Wadsworth

*Rule 608(b) merely codified established case law. See, United States v. Mallah, 503 F.2d 971, 976-77 (2nd Cir. 1974); United States v. Glasser, 443 F.2d 994, 1002-1003 (2nd Cir. 1971); United States v. De Sapio, 456 F.2d 644, 648, n.1 (2nd Cir. 1972).

**The government also recalled Frank Le Vien to rebut one narrow and specific aspect of Ebbecke's testimony. (A 320 - 321)

testified, the court, on each occasion, gave a limiting instruction. (A 322, 344 - 345) It should be remembered that it was the trial judge, himself, who expressed doubt whether such instructions could avoid confusion. (A 213)

David Kaplan, an insurance broker, testified that he met Ebbecke in March of 1974 in an effort to gain financing for the purchase of an insurance company. (A 324) Kaplan was introduced to Ebbecke by a James Feeney, who described himself as a partner or associate of Ebbecke's. (A 324) After submitting a financial statement, the parties discussed a commitment letter for a \$500,000 loan. (A 327) Subsequently, Kaplan received a commitment letter for the \$500,000 from the Bank of Hempstead. When it appeared that there was some problem with processing the letter, Kaplan called Lester Wadsworth, an officer of the Hempstead Bank, who was the signatory on the letter. (A 229) Wadsworth denied any knowledge of the letter. (A 330) When Kaplan confronted Ebbecke, whose office was on the floor above the bank, Ebbecke summoned Wadsworth. (A 331) When Wadsworth was asked whether he signed the letters, the bank officer answered yes and affirmed his signature by initialing the letter. (A 331) This matter seems, thus far, simple enough. One must focus on what followed. By virtue of the government attorney's attempt to introduce the relevant documents, substantial confusion arose and the witness left the stand in a cloud of dust. (A 332 - 342) Consider the following colloquy.

"THE COURT: Counsel, do you wish to adhere to your objection?

MR. WEINBERG: Yes, your Honor. My ground is that

Mr. Feeney was also present at these conversations and it is conceivable that he could have written this letter and -

THE COURT: Yes, it is, and I am going to leave it to the jury as to who wrote this letter.

The jury will have available to it numerous material, including, of course, the documents to which reference has been made.

I think the final and ultimate determination is a fact for the jury.

I will leave it to them and that is their province and it certainly is not the court's province to involve itself with it.

With the understanding that the exhibit is received for a limited purpose and the determination of who wrote the exhibit is a matter for the jury's determination based on all the evidence before it, the objection is overruled."
(A 342 - 343)

As if the jury didn't have enough to contend with, they were, by virtue of this statement, immersed in the muddy waters of the Kaplan-Wadsworth transaction. By no stretch of the imagination did the jury receive clear and convincing proof of a similar act. See, United States v. San Martin, 505 F.2d 918, 921 (5th Cir. 1974); United States v. Machen 430 F.2d 523, 526 (7th Cir. 1970); United States v. Rosenwasser, 550 F.2d 806 (2nd Cir. 1977), at 812, n.6 (Gurfein, J. dissenting).

Lester Wadsworth testified that he was employed as a branch manager of the Hempstead Bank from January of 1966 through April of 1974. (A 346) In later February or early March of 1974, Ebbecke loaned Wadsworth \$2,400 so that Wadsworth could purchase an automobile. (A 347) A month or two after this loan, Wadsworth received a telephone call from David Kaplan and thereafter, from the First National City Bank to verify a letter of credit. (A 347 -348) Wadsworth had no knowledge of the matter. (A 348)

Later that day, Wadsworth testified, Ebbecke called him to his office to meet Mr. Kaplan. (A 348 - 349) Wadsworth refused. (A 349) The following day, Ebbecke pleaded with Wadsworth to meet Kaplan and, in effect, asked for a personal favor on the basis of the fact that Ebbecke had previously loaned Wadsworth \$2,400. (A 350) According to Wadsworth, Ebbecke suggested that they could let the loan "ride" in return for this favor. (A 351) As a result, Wadsworth appeared at a meeting with Kaplan and initialed the letter which was signed Lester Wadsworth, although not by him. (A 352) Ebbecke then explained to Wadsworth that this "letter of credit" was just a stall until an actual letter of credit could be obtained. (A 355)

The admissibility of other crimes or similar acts, under proper circumstances, has become hornbook law. Nothing is more settled in this Circuit than that:

"Evidence of similar acts, including other crimes, is admissible when it is substantially

relevant for a purpose other than merely to show a defendant's criminal character or disposition."

United States v. Deaton, 381 F.2d 114, 117 (2nd Cir. 1967);

United States v. Brettholz, 485 F.2d 483, 487 (2nd Cir. 1973);

United States v. Torres, 519 F.2d 723, 737 (2nd Cir. 1975);

United States v. Papadakis, 510 F.2d 287, 294 (2nd Cir. 1975);

United States v. Gerry, 515 F.2d 130, 140-141 (2nd Cir. 1975);

Federal Rules of Evidence, Rule 404(b). For the reasons set forth below, however, appellant John Ebbecke submits that under the facts and circumstances of this case, admission of the so-called similar acts showed little more than criminal propensity and was obviously confusing and prejudicial.

With regard to the Wadsworth transaction, perhaps the most telling characterization of this evidence came from the government attorney himself. In an attempt to have this evidence placed before the jury, the prosecutor made the following statement:

"However, if there is evidence to show that Mr. Ebbecke was a wheeler-dealer, in fact, completely violated the rules of normal banking practice, in fact, created forged letters of credit, then they could consider that with respect to his knowledge of whether he, in fact, knew what was happening to the Ficarra loans, the Cellini loans, the Alpha loans, etc." (A 116)

This, then, was the nuts and bolts of the government's proffer. The government wanted to clearly impart to the jury that Ebbecke was a "wheeler-dealer," in other words, a schemer and, in effect, a criminal type. This is clearly prohibited by the case law cited above and Rule 404(b), which states that such

testimony ". . .is not admissible to prove the character of a person in order to show that he acted in conformity therewith."

By the prosecutor's own statement, this is precisely the purpose for which the testimony was offered.

Moreover, it is submitted that this Court should consider the district court's initial reaction which predicted that prejudice and confusion would result, in addition to the expressed doubt about the effectiveness of instructions. (A 213) In admitting this evidence and giving the jury instructions as to its use on several occasions, including in the charge (A 436 - 437), the court abandoned its earlier prognosis. However, a review of this case establishes beyond cavil that the judge's initial analysis was correct. The fact that this evidence came in on rebuttal, the fact that evidence of the forgery by Ebbecke, himself, was somewhat unclear, the fact that the evidence became the subject of a trial within a trial, United States v. Mallah, supra, all lead to insurmountable prejudice and confusion. Furthermore, this prejudice and confusion was exasperated by the fact that the jury heard what amounts to two separate sets of instructions on how they could use the testimony. When the Wadsworth transaction first came up in the cross-examination of Ebbecke, the jury was told that it was being admitted solely on the issue of credibility. Later, and repeatedly, the jury was to learn that the evidence was admitted on the issue of knowledge and intent only. All this served to unduly intensify the import of this testimony and raised it to one of the most important features in the trial. Plainly stated, this evidence was blown out its intended

proportion. Indeed, reference to this evidence became the capstone of the government attorney's rebuttal summation. (A 409)

If this case were dissected without regard to practical considerations of trial practice and jury responsibility, one may believe that reversible error was not present. Rule 404(b) has certainly been given liberal application. See, United States v. Rosenwasser, *supra*. What is admissible on the government's direct case is, in the court's discretion, admissible on the rebuttal case. United States v. Purin, 486 F.2d 1363, 1367 (2nd Cir. 1973). In this case, however, the totality of the circumstances, the "trial within a trial," the skirting of Rule 608(b) by in actuality introducing extrinsic evidence on a collateral matter, all serve to deprive the appellant of his right to a fair trial. Under Rule 403, Fed.R.Evid. and under established case law, see, United States v. Leonard, 524 F.2d 1076, 1091 (2nd Cir. 1975), there is a balancing test required to determine whether any relevant evidence should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In the instant case, it is respectfully submitted, the court's resolution of that balancing test was clearly erroneous.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction should be reversed and the indictment dismissed or, in the alternative, that the judgment of conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

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